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No. 73-598

Supreme Court, U. S.
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OCT 4 1973
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

MICHAEL J. MARCHIO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner, Michael J. Marchio, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming a judgment of conviction and sentence entered by the United States District Court for the Northern District of Illinois, Eastern Division.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported, but is printed in the appendix to this petition (Appendix "A"). The opinion of the Court of Appeals

was entered on August 8, 1973. A timely Petition for Rehearing was denied by order entered September 6, 1973 (Appendix "B").

JURISDICTION

The judgment of the Court of Appeals was entered on August 8, 1973 (Appendix "A"). A timely Petition for Rehearing was denied on September 6, 1973 (Appendix "B").

The jurisdiction of this Court is invoked pursuant to 28 USC 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V, Constitution of the United States of America

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

Amendment VI, Constitution of the United States of America

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . .".

QUESTIONS PRESENTED

1. Can a defendant, who has exercised his rights not to testify, to rely on the rulings of the trial judge, to rely on the failure of the government to prove him guilty beyond a reasonable doubt, and to rely upon his presumption of innocence, and who thus has rested his case prior to the presentation of his co-defendant's case and been told by the trial Court that he can not cross-examine witnesses thereafter, be held to have waived his rights to confront and cross-examine witnesses presented against him?

2. Did not the trial Court's forbidding of the petitioner to cross-examine his co-defendant who presented an entrapment defense fully implicating the petitioner deny the petitioner his Sixth Amendment rights to confront and cross-examine witnesses even though the trial court instructed the jury that said evidence was not admissible against the petitioner in light of *Bruton* v. *United States*, 391 U.S. 123?

3. Is a defendant's extra-judicial, uncorroborated statement standing alone, sufficient evidence on which to convict a defendant in federal criminal felony trial?

4. Was it denial of due process to deny a defendant's motion for severance and at the same time deny him the right to cross examine witnesses and co-defendants who gave crucial testimony against the defendant?

STATEMENT OF THE CASE

Nature of the Case and Its Disposition

Michael J. Marchio was indicted in the Northern District of Illinois, Eastern Division, along with one Allan B. Nardella, in a one-count indictment charging that, ". . . on or about the 24th day of July, 1971, at Joliet, . . .", the defendants ". . . did wilfully and knowingly transfer to Timothy C. Sack, a firearm, that is, a Chinese Communist Type 56 Assault Rifle, 7.62 mm, . . . without obtaining the prior approval of the Secretary of the Treasury or his delegate as required . . . in violation of . . ." 26 U.S.C. 5861(e). (R. 2, A. 1)*

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* Pursuant to Circuit Rule 24 of the United States Court of Appeals for the Seventh Circuit, the defendant-appellant elected not to file a separate appendix; however, certain portions of the record have been reproduced in a short appendix bound to the brief filed in the Court of Appeals, and references thereto shall be "A. ....". All other references shall be to the record on appeal: "R. ....", or to the transcript of proceedings: "Tr. ....".

The defendants pled "not guilty", and the matter was tried to a jury which returned a verdict of guilty on June 28, 1972. On July 19, 1972, after denying the defendants' post-trial motions, the defendant, Michael Marchio, was sentenced to three years' imprisonment on the condition that he be confined six months in a jail type institution, the execution of the remainder of the sentence was suspended, and the defendant placed on probation for a period of thirty months (R. 45, A. 5).

Pleadings

The defendant, Michael J. Marchio, filed certain pretrial motions including: Motion for Discovery (R. 6), Motion to Dismiss (R. 15), Motion for Bill of Particulars (R. 16), Motion to Suppress (R. 17), and a Motion for Severance (R. 18, A. 2). All of these motions were denied (docket entries, p. 3) with the exception that certain discovery and the bill of particulars was allowed (R. 12, p. 3 of docket entries).

The defendant Marchio's Motion to Suppress related to statements and was denied after a hearing (R. 21).

A jury was chosen and trial began before the jury on June 22, 1972 (R. 21).

The Trial

The only evidence admitted by the Court against the defendant Marchio in the government's case was testimony that a month after the date of the offense charged in the indictment, July 24, 1972 (R. 2, A. 1) the defendant Marchio transferred a weapon to a farmer who was at the time of trial facing charges of possession of stolen property (Tr. 237-261), and that Marchio also discussed the possible sale of another weapon with an agent (Tr. 207-236).

All of the evidence concerning the alleged transfer of the weapon involved in the indictment, which was admitted against the co-defendant Nardella, was not admitted against the defendant Marchio, and in fact the jury was instructed that said evidence could not be considered against the defendant Marchio (Tr. 32, 36, 46, 48, 102, 142, 200, 376, 400-401).

In fact, no evidence that there was a sale or transfer of an illegal weapon on July 24, 1972 as charged in the indictment was ever admitted against the defendant Marchio.

The defendant Marchio rested (Tr. 400) prior to any testimony given by the co-defendant Nardella. The trial judge ruled that by resting, the defendant Marchio could no longer participate in the case, could not cross-examine, and that all evidence received thereafter would not apply to him and so instructed the jury (Tr. 400-401).

Subsequently, the co-defendant Nardella testified on his own behalf, asserting the defense of entrapment, and fully implicated the defendant Marchio (Tr. 436-483). The defendant Marchio was not permitted to cross-examine, although the jury was instructed that Nardella's testimony was not to be considered against Marchio (Tr. 400-401).

Although the court instructed the jury that it was to consider each defendant's case only on the evidence admitted against that defendant (Tr. 579), the jury was unable to perform that mental gymnastic and found the defendant Marchio guilty (Tr. 603).

The defendant Marchio was sentenced by the Court to imprisonment for three years on the condition that he serve six months in a jail type institution, with the re-

mainder of the sentence being suspended, and the defendant placed on probation for a period of thirty months (R. 45, A. 5).

The defendant Marchio then appealed to the United States Court of Appeals for the Seventh Circuit which Court affirmed the conviction and sentence in an opinion entered August 8, 1973. A timely Petition for Rehearing was denied on September 6, 1973 and the defendant Marchio now petitions this Court to issue a writ of certiorari to review the opinion of the Court of Appeals.

REASONS FOR GRANTING THE WRIT

The Petitioner argues that the Court of Appeals refused to recognize the violation of his Sixth Amendment right to confrontation in violation of this Court's holding in *Bruton* v. *United States,* 391 U.S. 123.

Further, the Court of Appeals holding that the Petitioner waived his Sixth Amendment Rights when the Petitioner exercised his Fifth Amendment rights to due process, to rely upon the rulings of the trial judge, to not incriminate himself, and to rely upon his presumption of innocence and the burden of the government to go forward and prove the Petitioner guilty beyond a reasonable doubt, was to place one constitutional right above another of equal standing which should not be permitted.

The Court of Appeals holding in finding that the defendant's extra-judicial, uncorroborated statement (which was the sole evidence admitted against the defendant) was sufficient evidence on which to convict is in conflict with decisions of this Court, prior decisions of the Seventh Circuit Court of Appeals, and decisions of other Circuit Courts of Appeals.

In this case it was so tainted by the testimony of his co-defendant, who could not be cross-examined that no jury could follow the Court's instruction to disregard.

ARGUMENT

I.

THE TRIAL COURT ERRED IN DENYING THE PETITIONER MARCHIO'S REPEATED MOTIONS FOR SEVERANCE AND THE COURT OF APPEALS ERRED IN HOLDING THAT THE PETITIONER HAD WAIVED HIS RIGHT TO CONFRONT AND CROSS-EXAMINE WITNESSES.

Before trial, the petitioner Marchio moved for a severance from the defendant Nardella for, among other reasons, that the defendant Marchio:

> ". . . fears that on the trial of this cause, the Government may introduce statements of the co-defendant, inculpatory of him, which although not admissible against the defendant, would be admissible against the declarant and would result in prejudice to the defendant, even though the jury was instructed not to consider the statement against him. Bruton v. United States, 391 U.S. 123 (1968)"

and that

> ". . . the defendant believes his defense will be antagonistic to the co-defendant's defense and therefore prejudicial to him, he further believes that the co-defendant may present an entrapment defense which would be prejudicial to him." (R. 18, A. 2)

The petitioner Marchio's fears as expressed in his motion for severance did come true.

The acts and statements of the defendant Nardella were testified to and admitted against the defendant Nardella (the jury was admonished not to consider the evidence against Marchio). Included in this testimony, was

testimony that Nardella had gotten the gun from a friend, and that he (Nardella) was to receive $50.00 for selling it (Tr. 492). Further, the weapon allegedly illegally transferred was admitted against Nardella (Tr. 47).

Although the evidence was admitted solely against Nardella, and the jury repeatedly so instructed (Tr. 32, 36, 46, 48, 102, 142, 200, 376, 401), the evidence was clearly prejudicial to the petitioner Marchio.

However, the worst violation of the petitioner Marchio's right to a fair trial came after the petitioner Marchio had rested his case following the presentation of a few very credible reputation witnesses (Tr. 400).

The trial judge ruled that the petitioner Marchio could no longer participate in the trial, and that he would have no right of cross-examination (Tr. 399).

Subsequent to this, the co-defendant Nardella testified in his own behalf and testified that he was entrapped (Tr. 436-483). In so testifying, the co-defendant Nardella admitted the offense charged and fully implicated the petitioner Marchio. Although the jury was instructed that this testimony of Nardella was admitted only against Nardella and was not to be considered against Marchio, Marchio was not allowed to cross-examine Nardella, and the jury had the evidence before it.

As was stated in *Bruton* v. *United States,* 391 U.S. 123, 129, 130, 20 L.Ed. 2d 476, 481, 482:

> " 'The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collocation of words and fails of its purpose as a legal protection to defendants against whom such a declaration should

> not tell.' 352 U.S. at 247, 1 L.Ed.2d at 288. The dissent went on to say, as quoted in the cited note in Jackson, 'The government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds.' Id. at 248, 39 L.Ed. at 412. To the same effect, and also cited in the Jackson note, is the statement of Mr. Justice Jackson in his concurring opinion in Krulewitch v. United States, 336 U.S. 440, 453, 93 L.Ed. 790, 799, 69 S Ct 716: 'The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction . . .' . "

and as the Court went on to say at 391 U.S. 137, 20 L.Ed. 2d 485, 486:

> "Despite the concededly clear instructions to the jury to disregard Evans' inadmissible hearsay evidence inculpating petitioner, in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination. The effect is the same as if there had been no instruction at all."

This Court has held in *United States* v. *Heft*, 7 Cir., 413 F.2d 1027 (1969), that instructions to disregard inadmissible evidence are insufficient to protect a defendant.

It might be pointed out that the protective instruction given in the charge to the jury herein is quite similar to the one found insufficient in *Bruton* (Tr. 574, 579 — 391 U.S. 125, 20 L.Ed.2d 479, footnote 2).

The only way the petitioner Marchio could have received the fair trial to which he was entitled was for the trial court to grant his motion for severance. The trial court obviously abused its discretion in this cause, and the conviction of the petitioner Marchio should be reversed.

The Court of Appeals however held that the petitioner Marchio waived the right to confront and cross-examine the co-defendant Nardella because he rested his case. The Court makes this holding even though it likewise holds that the petitioner's defense was inconsistent with and antagonistic to the co-defendant Nardella's defense.

It was the trial judge who held that the petitioner could no longer participate in the trial and that he would have no right of cross-examination.

It is thus suggested that to hold that the petitioner's exercise of his Fifth Amendment rights not to testify, to rely on his right to due process of law and therein to rely on the trial judge's evidentiary rulings, the burden of the prosecution to prove him guilty beyond a reasonable doubt and the government's failure to meet that burden, and his presumption of innocence, constituted a waiver of his Sixth Amendment right to confront and cross-examine witnesses against him. In other words the Court of Appeals held that the exercise of one fundamental constitutional right can thereby waive another fundamental constitutional right.

This Court has held that ". . . the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him . . ." and ". . . a denial of cross-examination . . . would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." (*Smith* v. *Illinois,* 390 U.S. 129, 131, 19 L.Ed. 2d 956, 958-959, 88 S.Ct. 748.

It is suggested that this Court must resolve the question of whether an exercise of Fifth Amendment rights can be held to be a waiver of Sixth Amendment rights.

II.

AN EXTRA-JUDICIAL, UNCORROBORATED STATEMENT STANDING ALONE, IS NOT SUFFICIENT EVIDENCE ON WHICH TO CONVICT A DEFENDANT IN A FEDERAL CRIMINAL FELONY CASE AND THE COURT OF APPEALS HOLDING SO IN CONFLICT WITH OPINIONS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEALS.

In an attempt to say that the denial of Sixth Amendment rights to the petitioner, if error, was harmless error, the Court of Appeals held that an extra-judicial, uncorroborated statement, which was the only direct evidence admitted in evidence against the petitioner, was sufficient evidence to convict the petitioner in this federal criminal felony case.

In making this holding the Seventh Circuit is in conflict with decisions of this Court, (*Opper* v. *United States,* 348 U.S. 84, 99 L.Ed. 101, 75 S. Ct. 158), with other Circuit Courts of Appeals (*Wyatt* v. *United States,* 5 Cir., 263 F.2d 304; *Gonzales-Jasso* v. *Rogers,* D.C. Cir., 264 F.2d 585; *Gulotta* v. *United States,* 8 Cir., 113 F.2d 683; and *Manning* v. *United States,* 10 Cir., 215 F.2d 945; to name a few) and even prior decisions of the Seventh Circuit (See *United States* v. *Echeles,* 7 Cir., 222 F.2d 144).

The only other evidence admitted against the defendant Marchio concerned the testimony of Thomas Weinhold (Tr. 237-261), that in August of 1971, he bought an M-14 machine gun from Marchio. Weinhold further related that he was then facing State charges of having possessed stolen property, and that the M-14 was discovered during the execution of a search warrant in the stolen property case. He had then become a government witness.

The M-14, although admittedly not involved in the offense on trial, was admitted into evidence against Marchio, after evidence offered on the chain of possession after its seizure was received.

The above is the totality of the evidence admitted against Marchio. No direct evidence of a sale or transfer of a firearm on July 24, 1971, was ever admitted against Marchio.

While the evidence of subsequent acts might in this case give rise to some suspicion that Marchio took part in the sale on July 24, 1971, a suspicion is not enough to convict beyond a reasonable doubt.

The Fourth Circuit stated in *United States* v. *Ellicott,* 336 F.2d 868 at 871:

> ". . . this is only a probability which, however great, cannot convict."

It is suggested, as was argued in Point I, the jury was unable to ignore the evidence which was not admitted against Marchio, particularly the testimony of Nardella. But, this Court must consider only the evidence admitted against Marchio in determining the sufficiency of the evidence, and while the Court must view it in the light most favorable for the government ". . . if after resolving every conflict for the prosecution, the proof nowhere establishes guilt to the requisite degree, it is no longer a matter of weighing the evidence, for then no crime has been made out." (*United States* v. *Ellicott,* 336 F.2d 868, 871)

As Judge Minton wrote for the Seventh Circuit Court of Appeals in *United States* v. *Wainer,* 7 Cir., 170 F.2d 603, at 606:

"This evidence merely arouses a suspicion . . . We cannot agree that the defendant should go to prison on suspicion, even though it were a robust suspicion."

CONCLUSION

For the foregoing reasons, the Petitioner respectfully submits that his Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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